

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of the Commission's)
Ex Parte Rules in Joint Board Proceedings) CC Docket No. 98-73
_____)

BELLSOUTH COMMENTS

BellSouth Corporation, on behalf of its affiliated companies ("BellSouth"), hereby submits these Comments on the Commission's proposed revision to its *ex parte* rules.¹

The Commission proposes to alter its rules so that *ex parte* presentations by state commissions, their members, or their staffs to Joint Boards or to the Commission in Joint Board proceedings² would be required to be disclosed only if the presentations "are of substantial significance and clearly intended to affect the ultimate decision."³ Although BellSouth appreciates the Commission's desire to facilitate communications by states in Joint Board proceedings and to increase cooperation with states in such proceedings, BellSouth is concerned

¹ *Amendment of the Commission's Ex Parte Rules in Joint Board Proceedings*, Notice of Proposed Rulemaking, CC Docket No. 98-73, FCC 98-98 (released June 30, 1998) ("Notice").

² References to "Joint Board proceedings" herein are inclusive of "proceedings before a Joint Board, proceedings before the Commission involving a recommendation from a Joint Board or proceedings before the Commission involving further actions that may be required in any such proceedings," *see, Notice*, Appendix, at proposed Rule §§ 1.1206(a)(8), (b)(3), unless the context clearly indicates otherwise.

³ *Notice* at ¶ 7.

that the proposed revisions not come at the expense of parties whose interests may be affected by the outcome of Joint Board proceedings. Accordingly, BellSouth urges certain modification and clarification of the proposed revision.

Because the purpose of the Commission's *ex parte* rules is to "ensure the fairness and integrity of ... decision-making,"⁴ any modification of those rules in a manner that would reduce the circumstances in which *ex parte* communications must be disclosed to the public should not be taken lightly. The special standard for disclosure that the Commission has proposed for *ex parte* presentations by states in Joint Board proceedings is a standard that to date has been reserved only for *ex parte* presentations from Congress or the Executive Branch.⁵ Extending the application of this standard to include all of the fifty states' commissions, their members, and their staffs in Joint Board proceedings will materially expand the number of *ex parte* contacts that may go undisclosed.

BellSouth's concern with contacts that will go undisclosed derives in part from the subjectivity of the standard itself. Discretion apparently lies with the Commission staff to determine whether an oral or written presentation is of "substantial significance" and was "clearly intended" by the presenter to affect the ultimate outcome of the proceeding.⁶ If the staff determines that a presentation does not meet that threshold standard, the presentation will not become a part of the record of the proceeding. Yet, no criteria are suggested for determining whether the standard has been met. Accordingly, neither industry participants nor the general

⁴ 47 C.F.R. § 1.1200(a).

⁵ 47 C.F.R. § 1.1206(b)(3).

⁶ 47 C.F.R. § 1.1206(b)(3).

public whose interests may be affected by the outcome of a Joint Board proceeding will have any indication even of the type of information that may have been submitted by a state, but not disclosed, much less the content of such a submission.

Worse, the procedural scheme embedded in the Commission's rules leaves open the possibility that a Joint Board or the Commission ultimately could rely on a presentation made by a state, even if the presentation was not originally considered to be of "substantial significance" by the Commission staff or was not originally "clearly intended" by the submitting state to affect the ultimate outcome. A Joint Board or the Commission might then find itself relying on information that was never made part of the public record of the proceeding. To address this deficiency, the Commission -- should it adopt its instant proposal -- should further modify its rules to require, at a minimum, that any factual information obtained in a Joint Board proceeding and relied upon in the decision-making process be disclosed in the record no later than the time the decision is released. This recommended modification, which is consistent with requirements that attach generally to submissions by the Department of Justice, the Federal Trade Commission, and other federal agencies or branches of government,⁷ will ensure that any information not originally meeting the "substantial significance/clearly intended" disclosure threshold ultimately will be disclosed if it is subsequently relied upon in the decision-making process.

The Commission's proposed revision to its *ex parte* rules implicates a delicate balance between administrative convenience and cooperation, on the one hand, and affected parties'

⁷ See, 47 C.F.R. §§ 1.1204(a)(b), (a)(6).

interests, on the other. BellSouth believes that with due consideration given to the observations herein, that balance can be maintained.

Respectfully submitted,
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